Filed 6/12/07 Four Corners Realty Financial v. The Burford Group CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FOUR CORNERS REALTY FINANCIAL,

Plaintiff, Cross-defendant and Respondent,

v.

THE BURFORD GROUP et al.,

Defendants, Cross-complainants and Appellants;

RIGOBERTO DIAZ,

Cross-defendant.

G037140

(Super. Ct. No. 04CC10639)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed as modified.

Bradley R. Kirk & Associates and Bradley R. Kirk for Defendants, Cross-complainants and Appellants.

Law Office of Dean R. Kitano and Dean R. Kitano for Plaintiff, Cross-defendant and Respondent.

* * *

INTRODUCTION

Two residential loan companies – Four Corners Realty Financial (Four Corners) and The Burford Group – filed lawsuits against each other. A jury found in favor of Four Corners, awarding it a total of $92,000 in compensatory damages on claims for constructive fraud, breach of fiduciary duty, and negligent misrepresentation, and $75,000 in punitive damages. The jury awarded no damages to The Burford Group or its owner, Noah Burford (Burford) (collectively referred to as appellants).

Appellants argue there was no evidence supporting the element of causation on Four Corners's claims for constructive fraud and breach of fiduciary duty. We agree the only evidence of causation of one type of damage alleged was inadmissible hearsay, and the trial court erred by admitting that evidence; the award of $92,000 in compensatory damages cannot stand. However, there was evidence of damages totaling $65,750, which did not suffer the same evidentiary problem. Therefore, we direct the trial court to modify the amount of the judgment to reflect only the damages for which there was admissible evidence at trial. The same analysis applies to the element of causation on the negligent misrepresentation claim.

Burford separately argues there was no substantial evidence of oppression, fraud, or malice to support the award of punitive damages against him. The jury's finding that Burford acted with malice, oppression, or fraud in breaching his fiduciary duty to Four Corners is inconsistent with and subordinate to the jury's finding that Burford did not act with an intent to defraud Four Corners. Under these circumstances, following *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118

Cal.App.4th 1061, 1073-1074 (opn. by Rylaarsdam, J.), we direct the trial court to modify the judgment to eliminate the punitive damages award against Burford.

Appellants also argue the judgment on the negligent misrepresentation claim must be reversed because the special verdict form for this claim contained an error. Appellants, however, waived this argument by failing to object to the form of the special verdict in the trial court. Because the jury was correctly instructed on this cause of action, and there was substantial evidence supporting the overall verdict, we affirm.

Burford also argues there was insufficient evidence to support the jury's verdict in favor of Four Corners and its president and owner, Rigoberto Diaz, on Burford's cross-complaint. (Although The Burford Group was also named as a cross-complainant, the claims could only have been asserted by Burford as an individual.) We conclude there was sufficient evidence supporting the jury's findings that Burford was adequately compensated for his share of the partnership's assets and that any breach of fiduciary duty or breach of contract by Four Corners and Diaz therefore did not proximately cause damage to Burford.

Finally, appellants' contentions that the trial court made miscellaneous errors do not require reversal of the judgment. Appellants take issue with the court's comments and rulings during opening statements and closing arguments, but the trial court has wide discretion to control the trial. Although the record shows the trial court initially misunderstood the standard by which it was to consider appellants' motion for a new trial, the court did ultimately reweigh the evidence before denying the motion. In any event, any error was not prejudicial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Burford is the president and chief executive officer of The Burford Group, a small residential loan company. Diaz is the president of Four Corners, another residential loan company. Burford began working as a loan officer at Four Corners in 1999. In

2001, he left Four Corners to work for American Home Loans. Burford returned to Four Corners in September 2002.

On July 31, 2003, Four Corners entered an agreement with LendingTree, Inc., under the terms of which LendingTree agreed to provide Four Corners with leads – information regarding people who had completed online applications on LendingTree's Web site expressing an interest in obtaining home loans. Four Corners was required to pay LendingTree an initial fee of $25,000 to have access to LendingTree's computer system. Four Corners also agreed to pay LendingTree $11 for every lead received. Each lead had a market value of $35 to $100. If the lead resulted in a closed loan, Four Corners would report the closing and pay LendingTree a closed loan fee. Four Corners did not access the LendingTree system until January 2004, and received its first leads from LendingTree in February 2004.

Diaz and Burford agreed to form a partnership to purchase and use LendingTree leads. Diaz and Burford were to split equally the leads from LendingTree, with each paying the $11 lead fee for the leads he received and each paying any fees on the loans he closed. They also split the $25,000 initiation fee required by LendingTree. Burford and Diaz also had a separate agreement by which Burford would pay to use Four Corners's broker's license. Four Corners received 10 percent of the commission for every loan processed by Burford using Four Corners' license.

Burford obtained his own broker's license in March 2004. Diaz wanted to amend the agreement with LendingTree to allow The Burford Group to receive leads directly from LendingTree without Four Corners being responsible for reporting closed transactions or paying closed loan fees on loans resulting from those leads. No such amendment was approved by LendingTree.

On May 13, 2004, Burford and Diaz met. Diaz expressed displeasure that a Four Corners loan officer had processed a loan through The Burford Group under Burford's new broker's license, rather than through Four Corners, meaning Four Corners

did not receive any commission on the transaction. Diaz said he was also upset because Burford was setting up separate relationships with other lenders behind Diaz's back. Ultimately, Diaz told Burford that Four Corners would cease doing business with appellants.

Diaz refused to pay back Burford's share of the initial LendingTree fee because he believed the value of the leads Burford had received from LendingTree was greater than $12,500. Burford agreed to close any open loans through Four Corners, and Four Corners paid The Burford Group the commissions on all the closed loans. In a conference call between Burford, Diaz, and Chuck Robinson (a LendingTree employee) soon after the May 13 meeting, it was agreed that Burford would continue to use Four Corners's access to the LendingTree system until all The Burford Group's loans in progress closed, to facilitate tracking and reporting.

Diaz stopped providing LendingTree leads to Burford. Burford then refused to report closed loans and pay closed loan fees on loans developed from LendingTree leads because he considered those obligations under the partnership, which Diaz had terminated. Burford did not report any closed loans after May 13, 2004. Diaz, however, learned from The Burford Group's employees that they had thereafter closed loans generated from LendingTree leads. Four Corners ultimately identified 53 such transactions, and paid LendingTree the closed loan fees for loans which had resulted from LendingTree leads.

Four Corners sued appellants for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Appellants cross-claimed against Four Corners and Diaz, asserting causes of action for breach of oral contract, unjust enrichment, and breach of fiduciary duty. (Other claims by both parties were voluntarily dismissed before trial.)

On January 20, 2006, the jury rendered a special verdict, in which it found, on Four Corners's complaint: (1) Burford breached a fiduciary duty to Four Corners in

that Burford would report all closed LendingTree loans to Four Corners and pay Four Corners the closed loan fees, resulting in compensatory damages of $92,000 and awarding punitive damages of $75,000; (2) appellants did not make a fraudulent promise to Four Corners; (3) Burford breached a fiduciary duty to Four Corners, resulting in compensatory damages of $92,000 and awarding punitive damages of $75,000; (4) appellants made a negligent misrepresentation to Four Corners, resulting in compensatory damages of $92,000; and (5) appellants were not liable to Four Corners for breach of contract. On the cross-complaint, the jury found: (1) Four Corners and Diaz did not breach a fiduciary duty to appellants; (2) Four Corners and Diaz did not breach a contract with appellants; and (3) neither Four Corners nor Diaz was unjustly enriched at the expense of appellants.

Judgment was entered February 28, 2006. On March 21, 2006, appellants filed a notice of intent to move for a new trial, a notice of intent to move for an order vacating judgment, and a motion for judgment notwithstanding the verdict (JNOV). On April 25, 2006, the trial court entered an order denying both the motion for a new trial and the motion for JNOV. Appellants timely appealed.

DISCUSSION

I.

STANDARDS OF REVIEW

"'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or*

drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.] The substantial evidence standard of review is applicable to appeals from both jury and nonjury trials. [Citation.]" (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.)

The denial of appellants' JNOV motion is also reviewed to determine whether substantial evidence supported the verdict. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 49.)

In reviewing an order *denying* a motion for a new trial, we "'must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]' [Citation.]" (*Ajaxo Inc. v. E*Trade Group Inc.*, *supra*, 135 Cal.App.4th at pp. 46-47.) This differs from our review of an order *granting* a motion for a new trial, which we review for an abuse of discretion. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 194.)

II.

BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD

Burford argues there was insufficient evidence to sustain the jury's verdicts on Four Corners's claims for constructive fraud and breach of fiduciary duty, because there was no evidence of causation. In both causes of action, Four Corners claimed it suffered damages because LendingTree reduced the number of leads provided to Four Corners as a result of Burford's failure to report closed loans developed through LendingTree leads.

Burford argues all the evidence of causation was inadmissible hearsay. He filed a motion in limine to exclude the evidence, which was denied, and objected to the testimony during trial; these objections were overruled. We review the trial court's

admission of the testimony over Burford's hearsay objections for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

With regard to Four Corners's claim for damages due to a loss of leads from LendingTree, causation was a required element.[1] All of the evidence supporting the element of causation was hearsay, as it was based on out-of-court statements to the witnesses at trial by Robinson, an employee of LendingTree, who did not appear at trial. The hearsay rule reads as follows: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible. [¶] (c) This section shall be known and may be cited as the hearsay rule." (Evid. Code, § 1200.)

Robinson had been deposed before trial, and portions of his deposition transcript were read into the record at trial. None of the testimony from the Robinson deposition, which was read at trial, was relevant to prove causation on the constructive fraud and breach of fiduciary duty claims. Rather, the only evidence at trial supporting the loss of leads was testimony by Four Corners's employees as to what Robinson told them. This testimony is unquestionably inadmissible hearsay.

Although the trial court never explained what exception to the hearsay rule it believed applied, Four Corners "believe[s] that the Trial Court allowed such testimony based on a state of mind exception to the hearsay rule or the declaration-against-interest

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[1] The elements of a cause of action for constructive fraud are (1) the existence of a fiduciary relationship, (2) breach of a fiduciary duty to disclose relevant matters, (3) reliance, and (4) resulting damage. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 673, pp. 131-132.) Fraudulent intent may or may not be a necessary element to a claim of constructive fraud. (*Ibid.*) The jury was instructed that fraudulent intent was not an element of Four Corners's claim.

The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) breach of that duty, and (3) resulting damage. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 182.)

exception." Neither of these exceptions applies to this evidence. Robinson's out-of-court statement that Four Corners needed to keep its closed loan rates up and make customers happy to ensure that leads would continue to come in is not a statement of Robinson's or LendingTree's state of mind (Evid. Code, § 1250, subd. (a)); even if it was, such evidence would establish merely state of mind, not the required element of causation. These statements are also not declarations against interest by Robinson or LendingTree. (*Id.*, § 1230.) No other statutory exception to the hearsay rule could apply. (See *id.*, § 1220 et seq.)

In this case, it was an abuse of discretion for the trial court to admit the hearsay evidence. Because the hearsay evidence was the only evidence of causation of damages from the loss of future LendingTree leads, the court's abuse of discretion resulted in a manifest miscarriage of justice. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1527.)

However, there was evidence of damages sustained by Four Corners that were caused by appellants.[2] Four Corners offered evidence it paid $32,750 to LendingTree for the closed loan fees due on loans closed by appellants. Four Corners also offered evidence that it would have realized commissions on the 53 loans developed from LendingTree leads, which appellants closed through The Burford Group rather than through Four Corners. These lost profits would have totaled approximately $33,000. Therefore, Four Corners was entitled to recover the sum of $32,750 and $33,000 for a

[2] In their appellate briefs, both parties focus on Four Corners's claim that because Burford failed to report closed loans, LendingTree penalized Four Corners by decreasing the number of new leads. As Four Corners states in its respondent's brief, "[i]t was the reductions in leads to [Four Corners] that caused [Four Corners]'s financial damages." However, Four Corners's argument at trial was not so limited, and the issue of its other damages resulting from appellants' acts and omissions was fully briefed on appeal.

total of $65,750 in damages on the constructive fraud and breach of fiduciary duty claims.[3] We direct the trial court to modify the judgment accordingly.

III.

PUNITIVE DAMAGES

On Four Corners's claims for constructive fraud and breach of fiduciary duty, the jury awarded $75,000 in punitive damages against Burford. Burford argues there was not substantial evidence he acted with oppression, fraud, or malice, so as to justify the imposition of punitive damages. Four Corners completely fails to address this issue and has therefore waived the issue on appeal. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 259-260, fn. 13.) However, we must still review the record to determine whether Burford has demonstrated error, since we do not presume error even when the respondent fails to address the issue. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.)

Burford argues in his opening brief that he undertook no actions that could be considered oppressive, fraudulent, or malicious with respect to his partnership with Diaz and Four Corners. Burford acknowledges he did not report any closed loans and did not pay any closed loan fees after Diaz terminated the partnership agreement on May 13, 2004, believing the termination of the agreement ended Burford's reporting responsibilities. The jury concluded Burford's actions constituted constructive fraud and a breach of his fiduciary duty, and on both of those claims found, "Mr. Burford acted with malice, oppression or fraud such that an award of punitive damages should be awarded to Plaintiff."

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[3] Four Corners argues on appeal that it suffered at least $100,000 in damages as a result of appellants' failure to report closed loans, citing the testimony of Four Corners's chief operating officer, Nicholas Hanneman. Hanneman's testimony was that appellants' failure to report closed loans caused Four Corners to lose at least $100,000 *in revenue, not profit*. Hanneman did not testify to the profit Four Corners might have realized on $100,000 in revenue, so his testimony on this point is irrelevant.

Punitive damages may be recovered in connection with a claim for breach of fiduciary duty. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1390.) Punitive damages may in some cases be recovered for a claim of constructive fraud. However, to recover punitive damages under these causes of action, the requirements of Civil Code section 3294 must be satisfied. Were they in this case? No. Specifically, the jury was instructed that proof of an "actually fraudulent intent" was not an element of the cause of action for constructive fraud, and the special verdict form did not ask the jury whether it found Burford had acted with an intent to harm Four Corners in committing constructive fraud.

As for the cause of action for fraud, on which the jury found in favor of appellants, the jury answered the special verdict form questions as follows:

"Question No. 1: Did Mr. Burford and/or TBG [The Burford Group], make a promise as to a material matter, i.e., that Mr. Burford and/or TBG, as a net branch office of Plaintiff, will pay Plaintiff fees for each loan Mr. Burford and/or TBG closed and/or did Mr. Burford and/or TBG promise to report all closed loans to Plaintiff.

"Answer 'yes' or 'no'.

"Mr. Burford ✓ Yes ___ No

"TBG ✓ Yes ___ No [¶] . . . [¶]

"Question No. 3: Did Mr. Burford and/or TBG make the promise with an intent to defraud the Plaintiff?

"Answer 'yes' or 'no'.

"Mr. Burford ___ Yes ✓ No

"TBG ___ Yes ✓ No"

The jury's finding of a lack of intent to defraud on the fraud claim is inconsistent with its findings of malice, oppression, or fraud on the claims for which it awarded punitive damages. If there was not a preponderance of the evidence of appellants' intent to defraud Four Corners, there cannot be clear and convincing evidence

of "conduct which is *intended . . . to cause injury* to the plaintiff or despicable conduct which is carried on by the defendant with a *willful and conscious disregard* of the rights . . . of others"; or "despicable conduct that subjects a person to cruel and unjust hardship *in conscious disregard* of that person's rights"; or "an *intentional* misrepresentation, deceit, or concealment of a material fact known to the defendant *with the intention* on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(1)-(3), italics added.)

Therefore, an award of punitive damages under Civil Code section 3294 requires an intentional act on the part of the defendant. "'Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages. . . . [¶] Something more than the mere commission of a tort is always required for punitive damages.'" (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894-895.) "Moreover, the punishable acts which fall into these categories [of Civil Code section 3294] are strictly defined. Each involves 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injur[ious]' nature. [Citation.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721, first bracketed insertion added.) Given the jury's findings in the special verdicts, there is no such intentional act in this case.

In *Textron Financial Corp. v. National Union Fire Ins. Co., supra,* 118 Cal.App.4th 1061, this appellate court considered a similar situation of a jury making contradictory findings. In that case, in a special verdict, the jury found one of the defendants did not have an intent to defraud the plaintiff. (*Id.* at p. 1073.) The jury also made a finding relative to a punitive damages award that the defendants were "'guilty of fraud, malice, or oppression in the conduct upon which [it] based [its] finding of liability.'" (*Ibid.*) In the opinion, a panel of this court held, "the finding relevant to

defendants' punitive damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud." (*Id.* at pp. 1073-1074.)

Here, too, the jury's finding that Burford acted with malice, oppression, or fraud must be subordinate to its finding that Burford had no intent to defraud. Therefore, we reverse the award of punitive damages against Burford on the claims for breach of fiduciary duty and constructive fraud.

IV.

NEGLIGENT MISREPRESENTATION

A.

Special Verdict Form

Appellants challenge the jury's verdict on the claim for negligent misrepresentation because the special verdict form omitted one element of the cause of action. A claim for negligent misrepresentation requires proof that (1) the defendant represented to the plaintiff the truth of an important fact; (2) the representation was not true; (3) the defendant did not have reasonable grounds for believing the representation was true at the time it was made; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the representation caused the harm. (Civ. Code, § 1710, subd. 2; Judicial Council of Cal. Civ. Jury Instns. (2006) CACI No. 1903.)

The special verdict form contains an obvious typographical error; it reads, "[d]id *Plaintiff* have a reasonable grounds for believing the representation was true when they made it?" (Italics added.) The question that should have been presented to the jury is whether Burford and The Burford Group – *defendants* below and appellants – had a reasonable ground for believing the truth of their representation.

Appellants agreed to the form of the special verdict, and did not raise any objection to the verdict before the jury was dismissed. Appellants have waived the right to complain about the special verdict form. (*People v. Jones* (2003) 29 Cal.4th 1229, 1259; *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 851; *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, 64, superseded by statute on other grounds.) Even if the issue had not been waived, we would nevertheless conclude the jury did not omit a finding on the claim for negligent misrepresentation, given the instructions the jury received.

The jury was instructed with CACI No. 1903 regarding negligent misrepresentation. This instruction correctly informed the jury Four Corners was required to prove "[t]hat The Burford Group and/or Noah Burford had no reasonable grounds for believing the representation was true when The Burford Group and/or Noah Burford made it."[4] The jury was also instructed, with respect to the special verdict form, "I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the forms carefully." Because the jury was correctly instructed regarding the elements of the cause of action, and had the instructions with it while deliberating, we believe the jury correctly understood the question it was to answer. And since appellants waived any objection to the form of the verdict, we presume the jury correctly found appellants had no reasonable ground to

[4] The reading of the jury instructions was not transcribed, pursuant to the parties' stipulation. Several sets of the jury instructions were sent into the jury room during deliberations. Appellants' appendix includes a set of instructions which purports to be the instructions as read to the jury; this set does not include an instruction on negligent misrepresentation. Four Corners's opposition to appellants' motion for a new trial, however, attaches a copy of CACI No. 1903, modified to refer to the names of the parties in this case. Appellants did not argue this instruction was not given to the jury; to the contrary, they referenced it in their reply to Four Corners's opposition to the motion for a new trial. (The set of instructions included in appellants' appendix also does not include any instructions on the causes of action for fraud and breach of fiduciary duty. This strengthens our belief that the set of instructions in the appendix is not, in fact, complete.) Therefore, we presume the jury was correctly instructed on the elements of negligent misrepresentation.

believe the truth of their representation. (See 7 Witkin, *supra*, Trial, § 375, p. 427 ["A verdict should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence"].)

Appellants also argue a finding they had no reasonable grounds for believing the representation was true was inconsistent with another finding by the jury. In its special verdict on Four Corners's claim for fraud, the jury found in the affirmative as to the following question: "Did Mr. Burford and/or TBG, make a promise as to a material matter, i.e., that Mr. Burford and/or TBG, as a net branch office of Plaintiff, will pay Plaintiff fees for each loan Mr. Burford and/or TBG closed and/or did Mr. Burford and/or TBG promise to report all closed loans to Plaintiff." The jury also answered the next question affirmatively: "At the time Mr. Burford and/or TBG made the promise, did Mr. Burford and/or TBG intend to perform it?" Given the broad language of the first question and its repeated use of the phrase "and/or," we cannot say the jury's affirmative response to the second question proves appellants had reasonable grounds to believe they would report all closed loans to Four Corners. Therefore, we cannot say the findings on the fraud and negligent misrepresentation claims are inconsistent.

Appellants further argue the verdict on negligent misrepresentation cannot stand because they were not charged with making a misrepresentation of a past or existing fact. The statement, "I currently intend to do something in the future," is a statement of existing fact. Appellants' argument on this point is meritless.

B.

Causation

If there was no admissible evidence that appellants' failure to report closed loans to LendingTree caused a decrease in the number of leads LendingTree provided Four Corners in connection with the constructive fraud and breach of fiduciary duty claims, we cannot ignore that lack of admissible evidence when considering the negligent misrepresentation claim. For the same reasons explained, *ante*, we direct the trial court to

modify the judgment to award Four Corners $65,750 in damages on the negligent misrepresentation claim against appellants.

V.

CROSS-COMPLAINT

The jury found in favor of Diaz and Four Corners on appellants' cross-claims for breach of fiduciary duty, breach of contract, and unjust enrichment. Appellants argue there was no substantial evidence supporting the jury's special verdict on the cross-complaint and the trial court erred by denying their motions for a new trial and for JNOV.

The only issue we need to consider is whether there was sufficient evidence that Diaz and Four Corners adequately compensated Burford for his share of the partnership. Although these claims were asserted by both appellants, there was no evidence The Burford Group entered into any oral or written contract with Four Corners or Diaz. Further, The Burford Group was not a partner of either Four Corners or Diaz. Therefore, it could not assert claims for breach of fiduciary duty or for breach of contract. The remainder of our discussion will address Burford's claims only.

Four Corners and Diaz do not offer any argument or present any evidence that could support a finding by the jury that they did not breach a contract with or breach a fiduciary duty to Burford. Four Corners argues the jury's finding that Burford breached a fiduciary duty to Four Corners and Diaz is sufficient to support the verdict that Four Corners and Diaz did not breach their fiduciary duty to Burford. Four Corners fails to provide any support for an argument that both partners cannot breach their respective duties to each other. We assume the jury found Four Corners and Diaz breached their

fiduciary duties to Burford and breached their contract with him, but did not find Burford suffered any damages as a result.[5]

Appellants cite several cases for the proposition that one partner cannot terminate the partnership and take the partnership's assets for itself without making reasonable compensation to the other partner. (See *Leff v. Gunter* (1983) 33 Cal.3d 508, 515; *Page v. Page* (1961) 55 Cal.2d 192, 196; *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 424-425.) So the question before us is whether there was sufficient evidence that appellants received reasonable compensation.

Diaz testified the profits appellants realized from the LendingTree leads were in excess of the $12,500 Burford invested to buy into the LendingTree program. Diaz calculated the market value of the leads Burford received from LendingTree ($35 to $100 per lead), less the amount Burford had paid for those leads ($11 per lead), and less the closed loan fees Burford had paid. This was sufficient evidence to support a finding by the jury that Four Corners's and Diaz's breach of contract and breach of fiduciary duty did not proximately cause damage to Burford.

[5] The jury answered each of the following questions in the negative on the special verdict forms: (1) "Did Mr. Diaz and/or Four Corners breach their fiduciary duty to Mr. Burford and The Burford Group in connection with a partnership relating to the receipt and distribution of LendingTree leads, and if so, did such breach proximately cause damages to Mr. Burford and The Burford Group?"; (2) Did Four Corners and/or Mr. Diaz breach a contract they entered into with Mr. Burford and The Burford Group to acquire and share LendingTree leads, and if so, did such breach proximately cause damages to Mr. Burford and The Burford Group?"; and (3) "In connection with the leads and resulting income received by Mr. Diaz or Four Corners under the [Computer Loan Origination] Agreement, did either Mr. Diaz or Four Corners Realty Financial receive a benefit and unjustly retain this benefit at the expense of Mr. Burford and The Burford Group?"

VI.

MISCELLANEOUS CLAIMED ERRORS

A.

Objections to Opening Statement

Appellants argue the trial court erred by sustaining Four Corners's objections to their counsel's opening statement. Appellants claim the trial court sustained the objections and admonished their attorney for giving too much detail in an opening statement. The amount of time given for opening statements is a matter for the sound discretion of the trial court. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2006) ¶ 6:12, p. 6-3 (rev. #1, 2006).) The trial court's discretion was not abused in this case.

B.

Use of Special Verdict Form During Closing Argument

Appellants complain the trial court refused to permit their counsel to use the special verdict form during closing argument. The trial court has the authority to determine whether a party may use an enlargement of a verdict form during closing argument. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, ¶ 13:369.1, p. 13-83 (rev. #1, 2004).) Given the fact the special verdict form was 18 pages in length, we cannot say the trial court erred. Similarly, it is within the trial court's authority not to permit a party in closing argument to tell a jury how to fill in a verdict form. (*Id.*, ¶ 13:369.2, p. 13-83.)

In reviewing appellants' counsel's closing argument, it is obvious that, in response to Four Corners's counsel's objections and the trial court's rulings on those objections, appellants' counsel stopped quoting from the special verdict form. But counsel continued on with his closing argument discussing the elements of the causes of action and the evidence.

Appellants' counsel far exceeded his estimated time for closing argument. After the court chastised him for doing so, counsel continued and was not stopped from completing his argument. In sum, we find no abuse of the trial court's discretion in the manner in which it attempted to control closing argument.

C.

Incorrect Standard for New Trial Motion

Appellants argue the trial court erred by applying an incorrect standard when it denied their motion for a new trial. Code of Civil Procedure section 657 reads in relevant part: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." Thus, section 657 by its terms requires the trial court to weigh the evidence and consider the entire record. (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 413.) In weighing the evidence, the court may draw any inferences from the evidence, and must consider the demeanor and believability of the witnesses. (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112.)

The trial court's tentative ruling denying the motion for JNOV and denying the motion for a new trial reads, in part: "Defendants essentially ask the Court to weigh the evidence at times, which the court cannot do." The tentative ruling also reads, in part: "Defendants are asking the Court to believe their set of facts instead of allowing the jury to believe plaintiff's set of facts. This is not the purpose of a Judgment Notwithstanding the Verdict Motion nor a Motion for New Trial."

At the hearing on appellants' motions, the trial court made the following comments: "[Appellants' counsel] is asking me now to re-weigh the evidence. And if that's the case, then I will accede to your request, and not on the proposition that you're trying to invite appellate error. And if I re-weigh the evidence, frankly, although you

presented a very good case . . . , extremely good case, you were shot down by your own witnesses. I just did not believe your client, period. So that's so much for me re-weighing the evidence."

The trial court's initial understanding of its duty to independently weigh the evidence when considering a motion for a new trial was incorrect. But once the court did reweigh the evidence, it made clear its finding that Burford was an unbelievable witness.

Appellants argue that because their motion for a new trial was based primarily on the testimony offered by Diaz and Four Corners, the fact the court discredited all of Burford's testimony is irrelevant. The court stated it was reweighing the evidence and the evidence of Burford and appellants' other witnesses was not credible. By implication, the court was accepting and crediting the testimony of the witnesses offered by Four Corners and Diaz. If the court was not, then it would be considering the motion for a new trial in an "evidenceless" vacuum.

Even if the trial court erred in how it proceeded on the motion for a new trial, there was no prejudice. In reviewing an order denying a motion for a new trial, as distinguished from an order granting a motion for a new trial, an appellate court must independently review the entire record to determine whether any error in denying the motion was prejudicial. (Cal. Const., art. VI, § 13; *People v. Ault* (2004) 33 Cal.4th 1250, 1260-1261 & fn. 4 [distinction between deference given to orders denying versus granting new trials applies in both criminal and civil cases]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 590, fn. 15.) The issues raised in the motion for a new trial were the same as those errors asserted on appeal. We have detailed, *ante*, the reasons why some of appellants' arguments fail, while others have merit. There was no prejudice in any error committed by the trial court in denying the motion for a new trial.

DISPOSITION

We direct the trial court to modify the judgment by entering judgment in favor of Four Corners and against Noah Burford and/or The Burford Group in the amount of $65,750 instead of $92,000, and reversing the award of punitive damages against Burford. As modified, the judgment is affirmed. In the interests of justice, because each party prevailed on part of its claims, neither party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.